Supreme Court, U.S.
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No. 85-660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Colorado

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Due Process Clause precludes use at trial of an inculpatory statement made to police by Respondent which was compelled by his psychotic mental condition but which was not the result of coercive police conduct?

2. Whether Respondent's mental condition rendered his waiver of *Miranda* rights ineffective?

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STATEMENT OF FACTS

On August 18, 1983, Officer Patrick Anderson of the Denver Police Department was working in downtown Denver in an off-duty capacity, though in full uniform, when the Respondent, Francis Connelly, approached him and stated that he had killed someone and wanted to tell him about it. (J.A., 3-4) Anderson's initial response to Mr. Connelly was that he "thought he was some sort of a crackpot." (J.A., 4) Based on Mr. Connelly's statement, Anderson advised him of his *Miranda* rights, conducted a cursory search for weapons and placed him in handcuffs. (J.A., 5-6) Anderson then removed Mr. Connelly from the street and took him into a nearby newsstand. (Transcript of suppression hearing (hereinafter denoted by "Tr.") at page 11.) There Anderson removed Mr. Connelly's wallet and obtained a driver's license from the wallet. (Tr., 11) Anderson used a telephone in the newsstand to call the National Crime Information Center computer network to ascertain if there were any outstanding warrants on Mr. Connelly. (Tr., 12) There were none. (Tr., 12) Meanwhile, Mr. Connelly had given the additional information that he had killed a girl, with whom he had been traveling, in the area of West Mississippi Avenue (a Denver street). (Tr., 12)

Anderson called the Crimes Against Persons Bureau of the Denver Police Department and talked to Detective Stephen Antuna and related to him the information he had obtained from Mr. Connelly. (Tr., 12) Antuna told Anderson to retain Mr. Connelly in custody, and that he would respond to their location. (Tr., 13) While waiting for Antuna, Anderson, who had a "feeling" that Mr. Connelly previously had been in a mental institution. (J.A., 8) asked Mr. Connelly if he had ever been treated for any mental disorders. (J.A., 7) Mr. Connelly replied that he had been in five different hospitals. (J.A., 7; 9) Other than

questioning Mr. Connelly, Anderson did not threaten or promise him anything. (J.A., 8)

When Detective Antuna arrived and had been briefed on the situation by Officer Anderson, he removed the handcuffs and placed Mr. Connelly in his police car. (J.A., 12) Antuna verbally advised Mr. Connelly of his *Miranda* rights and asked him to tell him "what he had on his mind." (J.A., 12) Mr. Connelly said that he wanted to confess to the murder of a young Indian female. (J.A., 12) Antuna then transported Mr. Connelly to Denver Police Headquarters. (J.A., 13) There he contacted an Officer Haney who was more familiar with homicides in Denver, and began checking some records. (J.A., 13)

The records obtained by Officer Haney indicated that the body of an unidentified female had been discovered in April of 1983. (J.A., 13) They went to Haney's office and "began to get more information from Mr. Connelly." (J.A., 14) Upon Detective Antuna's request, Mr. Connelly related to Haney the same information he had told to Antuna. (J.A., 15) Mr. Connelly told them that the murder took place in southwest Denver, and agreed to show them where the murder occurred. (Tr., 27) Antuna and Haney, using Haney's police car, drove Mr. Connelly around southwest Denver where he eventually directed them to a storage area at the rear of a building and stated that it was there that he had killed the woman. (Tr., 29) Mr. Connelly indicated that the murder occurred in November or December of 1982. (Tr., 33)

Mr. Connelly was charged in the District Court of the City and County of Denver, Colorado, on August 31, 1983, with the offense of second degree murder. (Record of pleadings (hereinafter denoted by "Pl.") at page 1) On the next day, September 1, the court remanded Mr. Connelly

to the Colorado State Hospital for an examination as to competency. (Pl., 4) On October 14, 1983, pursuant to a report dated September 22, 1983, which was filed with the court by Dr. Jeffrey Metzner, (Pl., 11-17)[1] the court found Mr. Connelly incompetent to proceed. (Pl., 21; 23)[2] On March 7, 1984, Mr. Connelly was deemed competent to proceed and a preliminary hearing was set. (Pl., 37) Prior to the preliminary hearing Mr. Connelly filed his Motion to Suppress Statements and Evidence on the grounds that because he was incompetent at the time, his confession to police was involuntary and he did not voluntarily, knowingly and intelligently waive his *Miranda* rights. (Pl., 43-44)

Upon completion of the testimony of Detective Antuna at the suppression hearing, the State indicated that it intended to present no further evidence. (Tr., 33) The

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[1] In the introduction to his report Dr. Metzner stated: "A psychiatric examination has been requested regarding the legal issue of . . . [Mr. Connelly's] competency to proceed and competency at the time of allegedly making a confession to the police" (Pl., 11) In the summary and opinion of his report Dr. Metzner concluded:

> It is my opinion that Mr. Connelly continues to suffer from a mental disease or defect which renders him incapable of understanding the nature and course of the proceedings against him, participating or assisting in his defense or cooperating with his defense counsel.
>
> . . . .
>
> Based upon my examination of Mr. Connelly, it is my opinion that he was experiencing psychotic symptoms during the time immediately preceding and following his alleged confession to the police. (Pl., 16-17)

[2] 8 Colo. Rev. Stat. § 16-8-102(3) (1978) provides:

> "Incompetent to proceed" means the defendant is suffering from a mental disease or defect which renders him incapable of understanding the nature and course of proceedings against him or of participating or assisting in his defense or cooperating with his defense counsel.

defense then called Dr. Jeffrey Metzner, who was received as an expert in the field of forensic psychiatry. (J.A., 17) Dr. Metzner stated that at the request of the court he conducted an examination of Mr. Connelly to determine his competency to stand trial as well as his competence to make a confession to the police. (Tr., 48) In the course of his examination Dr. Metzner obtained various information from Mr. Connelly. (J.A., 18) Mr. Connelly stated that on the afternoon of August 17, 1983, when he was in Boston, Massachusetts, he began experiencing God's voice telling him to go to Denver and confess the crime of murder to a policeman. (J.A., 18) Upon arriving in Denver the voices told him that he had only two choices: to confess or to kill himself. (J.A., 19) Mr. Connelly eventually made his way to downtown Denver where he went up to the first policeman he saw and confessed. (J.A., 22)

Dr. Metzner diagnosed Mr. Connelly as suffering from chronic schizophrenia. (J.A., 23) Mr. Connelly's symptoms included the experiencing of auditory hallucinations, *i.e.*, hearing voices that are not really there. (J.A., 24) Dr. Metzner stated that the importance of the voices experienced by Mr. Connelly was that they were of a type called "command hallucinations." (J.A., 25) With this type of hallucination, the person experiencing it feels that he has to act on whatever the voice is telling him. (J.A., 25) Dr. Metzner stated that in his opinion Mr. Connelly's illness did not impair his cognitive abilities, meaning "that when he was read his *Miranda* rights, he probably had the capacity to know that he was being read his *Miranda* rights, and he had certain rights, but . . . I think he wasn't able to use that information because of the command hallucinations that he had experienced." (J.A., 25-26) Upon being asked if he had an opinion whether Mr. Connelly spoke voluntarily to the police, Dr. Metzner

stated: "I don't think that he was able to make a free and intelligent decision in making that statement based on impairment by his chronic schizophrenia." (J.A., 26) Dr. Metzner was then asked whether Mr. Connelly might not have been psychotic when he talked to the police, and he stated that although that was a possibility, based upon his examination of Mr. Connelly, together with the history of records from previous hospitalizations, he was of the opinion that Mr. Connelly was psychotic at that time. With respect to the waiver of rights Mr. Connelly signed, Dr. Metzner stated:

> It's my opinion that Mr. Connelly felt that he didn't have a choice about making a confession. It was not just that his instructions from God and not just instructions, it was that his command from God was that, you go tell the police, and you tell them everything that happened, and you don't have a choice, and if you have to sign things, you sign things, but you have to tell them, and that's what he—in my opinion is what he was acting on.

(J.A., 29)

Upon being asked upon cross-examination whether the voices Mr. Connelly was hearing could be characterized as a guilty conscience, Dr. Metzner stated that in his opinion the voices were primarily attributable to Mr. Connelly's psychotic state. (J.A., 32-34) Finally, in response to a question whether, in view of the fact that Mr. Connelly chose to confess rather than to kill himself he could have chosen to sign the advisement as well, Dr. Metzner stated: "It was my opinion that he really didn't have much of a choice." (J.A., 36)

At the conclusion of the evidence, the trial court stated its findings and conclusions as follows:

Here, in the Court's estimation, there's no question that the Defendant did not exercise free will in choosing to talk to the police. He exercised a choice both of which were mandated by auditory hallucination, had no basis in reality, and were the product of a psychotic break with reality. The Defendant at the time of the confession had absolutely in the Court's estimation no volition or choice to make. He was compelled by his illness to do that which he did, and he did so in a manner which is not unusual for people who suffer schizophrenia. He was able to do so so that trained, experienced police officers were not able to discern the mental difficulty that the Defendant was having.

The Court feels that with the overwhelming evidence presented by the Defense, that if I must balance this by a preponderance of the evidence that the Prosecution just cannot meet that burden and did not meet that burden under these circumstances. In judging all of the circumstances then . . . the Court feels that the People have not met their burden by a preponderance of the evidence to show that the statement was voluntary.

In addition, the People would have to show if we even would get that far by a standard of clear and convincing evidence that the Defendant waived his right to counsel and his right to self-incrimination, and the Court cannot find by that standard being even a more difficult standard for the Prosecution that he did waive his right to counsel and his right to self-incrimination voluntarily, knowingly and intelligently; rather, he would sign anything, he would do anything to follow the mandate of God to confess because his only alternative was to kill himself, and he did not choose to do that, both alternatives, however, being a figment of his imagination and a very definite product of his psychosis.

(J.A., 47-49)

The Court then ruled that the prosecution could not present any evidence concerning Mr. Connelly's statements to the police after he contacted them. (J.A., 49)

The Colorado Supreme Court affirmed the ruling of the trial court. *People* v. *Connelly*, 702 P.2d 722 (Colo. 1985). After noting that "[t]he issue of voluntariness must be resolved by evaluating the totality of circumstances surrounding the making of the statement," *id.*, 702 P.2d at 728, the court ruled that under that test "[t]he record in this case supports the district court's determination that the defendant's initial statement to Officer Anderson on August 18, 1983 . . . was not the product of a rational intellect and a free will notwithstanding the fact that this statement was neither solicited by the officer nor was the result of any form of police action." *Id.*, 702 P.2d at 729.

The Colorado Supreme Court also affirmed the trial court's ruling that Mr. Connelly did not effectively waive his *Miranda* rights as to the subsequent statements made to police:[3]

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[3] In view of its ruling that the subsequent admissions were obtained in violation of *Miranda* requirements, the Colorado Supreme Court did not consider, and thus did not rule on, the question of whether those statements were involuntary under due process standards. Since those statements were not volunteered, but resulted from police questioning, a ruling by this Court that the initial statement to Officer Anderson was voluntary because it resulted from no police action, would not necessarily require the same result with the subsequent statements obtained through police questioning. Similarly, the Colorado court did not consider whether, given the involuntariness of the initial statement, the subsequent statements derived from that statement. *See Darwin* v. *Connecticut*, 391 U.S. 346 (1968); *Clewis* v. *Texas*, 386 U.S. 707 (1967); *Gallegos* v. *Colorado*, 370 U.S. 49 (1962). Since these issues were not considered by the Colorado Supreme Court, they are not properly before this Court for review. *See Illinois* v. *Gates*, 462 U.S. 213 (1983).

> In light of the psychiatric testimony presented to the district court, we see no reason to disturb the court's conclusion that the prosecution failed to prove by clear and convincing evidence that the defendant effectively waived his *Miranda* rights. The testimony of Dr. Metzner clearly established that . . . [the defendant] was incapable of making an intelligent and free decision with respect to his constitutional right of silence while in custody and his constitutional right to confer with a lawyer before talking to the police.

Id., 702 P.2d at 729.

Finally, the court remanded the case to the trial court for further findings as to the trial court's order suppressing evidence derived from Mr. Connelly's statements. Id., 702 P.2d at 730.

SUMMARY OF THE ARGUMENT

1. From the first application of the Due Process Clause of the Fourteenth Amendment to preclude admission of an involuntary confession in *Brown* v. *Mississippi*, 297 U.S. 278 (1936), the Court has variously described such confessions as coerced, compelled, not the product of a rational intellect and a free will, not freely self-determined, and not the product of a free and rational choice, to name a few. Nor has a precise definition of an involuntary confession been successfully formulated. The Court has, however, identified the factors to be considered in determining the voluntariness of a confession. Thus, "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973), are considered. Under this "totality of circumstances" standard, everything is relevant but no single factor is determinative. While a common feature of the

involuntariness determination has been the nature and extent of the confinement and interrogation of the defendant, his or her physical and mental characteristics and condition have also been given substantial consideration. In examining these two factors the Court has compared the circumstances of pressure applied in the interrogation process against the power of resistance of the person being interrogated. *Fikes* v. *Alabama*, 352 U.S. 191 (1957).

Both Petitioner and the Solicitor General (hereinafter sometimes referred to as the Government) argue that there can be no Due Process violation in the absence of coercive government conduct. While the cases invariably have involved some aspect of government conduct, usually in the form of coercive interrogation practices, in *Townsend* v. *Sain*, 372 U.S. 293 (1963), the Court noted that a prior case, *Blackburn* v. *Alabama*, 361 U.S. 199 (1960), had "held irrelevant the absence of evidence of improper purpose on the part of the questioning officers." *Townsend*, 372 U.S. at 309. Thus, although the nature and extent of the interrogation process is a factor to be considered in determining the voluntariness of a confession, it is not a prerequisite to a finding of involuntariness if the defendant's mental condition is such that his confession does not result from his "free and rational choice," *Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978), to confess.

In the present case the defense presented the testimony of Dr. Jeffrey Metzner, a psychiatrist appointed by the trial court to examine Mr. Connelly to determine his competence to stand trial. Dr. Metzner was of the opinion that Mr. Connelly suffered from severe schizophrenia and was psychotic. A prominent symptom of Mr. Connelly's psychosis was that he experienced command auditory hallucinations. Dr. Metzner explained that this is a type of

hallucination in which the person experiencing it hears voices and feels he has to act on whatever the voice is telling him to do. On the day he confessed to a police officer that he had killed a woman, Mr. Connelly was compelled to do so by voices which told him that the only alternative to confessing was to kill himself. Because Mr. Connelly's confession was compelled by the command hallucinations, Dr. Metzner was of the opinion that his confession was not volitional. In his report to the court, Dr. Metzner found that Mr. Connelly was incompetent to stand trial and that Mr. Connelly had suffered from the mental condition which caused his incompetency at the time he made his confession. The prosecution offered no medical testimony to dispute the findings and conclusions of Dr. Metzner.

Faced with the undisputed testimony of Dr. Metzner that Mr. Connelly was psychotic when he made the confession, and that the particular kind of psychosis from which he suffered compelled him to confess, the trial court ruled that the prosecution had failed to meet its burden of proving Mr. Connelly's confession voluntary. Evaluating the totality of circumstances surrounding the making of the statement, the Colorado Supreme Court affirmed the trial court's ruling, holding that the trial court's determination that Mr. Connelly's confession was involuntary was supported by the evidence. Given the unique factual posture of this case, the undisputed evidence of Mr. Connelly's impaired mental condition, and the Colorado Supreme Court's application of the proper constitutional standard to those facts, its ruling should not be disturbed on review.

2. *Miranda* v. *Arizona*, 384 U.S. 436 (1966), established concrete constitutional guidelines for law enforcement agencies and courts to follow in applying the

privilege against self-incrimination to custodial interrogations. *Miranda* required certain specified warnings to be given persons questioned in custody as a prerequisite to the admissibility of statements obtained thereby. The requirements specified by *Miranda* do not depend on whether the rationale underlying the *Miranda* decision is fulfilled in each particular case. Thus, *Miranda* is applicable to the statements made by Mr. Connelly in response to questioning by police officers if that questioning constituted "custodial interrogation." Since Mr. Connelly was handcuffed by police officers and removed from the street and since his statements were in response to questioning by the officers, the *Miranda* requirements are applicable.

In *Miranda* the Court acknowledged that a defendant could waive the rights to counsel and to remain silent, but placed a "heavy burden" on the government to prove that the defendant voluntarily, knowingly and intelligently waived those rights. Although an express waiver is not required, a valid waiver will not be presumed simply from the fact a confession is eventually obtained. In the present case although Mr. Connelly stated that he understood his rights, this was an insufficient showing to establish a valid waiver.

To be a valid waiver under *Miranda* it must be voluntary as well as knowing and intelligent. In the recent case of *Moran* v. *Burbine*, ___ U.S. ___, 106 S.Ct. 1135 (1986), the Court stated that for a waiver to be voluntary it must be the product of a free and deliberate choice, while the knowing and intelligent aspect requires an awareness of the nature of the right being waived and the consequences of forgoing it. The Court's description of the voluntary component of the waiver requirement substantially resembles that of the due process voluntariness

requirement for confessions. For the reasons stated in Argument 1, above, with respect to the voluntariness of confessions, Mr. Connelly's psychotic mental condition precluded him from voluntarily waiving his constitutional rights to counsel and to remain silent.

Mr. Connelly's impaired mental condition precluded him from being able to knowingly and intelligently waive his rights as well. As noted above, Dr. Metzner's undisputed finding that Mr. Connelly was incompetent to stand trial was based on his diagnosis of Mr. Connelly's mental condition which was present at the time he made the statements to the police officers. Thus, Dr. Metzner effectively found that Mr. Connelly was incompetent at that time as well as later. Mr. Connelly's incompetence clearly rendered any waiver neither knowing nor intelligent.

In order to voluntarily, knowingly and intelligently waive constitutional rights, a person must necessarily have the capacity to acceptably make a choice. Dr. Metzner testified that while Mr. Connelly had the capacity to know that he was being read his *Miranda* rights, he was not able to use that information to consciously choose between waiving his rights and confessing, since the former choice would require his self-destruction. This, of course, was no choice at all. Lacking the capacity to make a conscious choice, Mr. Connelly was precluded by his impaired mental condition from being in a position to voluntarily, knowingly and intelligently waive his right to counsel and to remain silent.

Both the Petitioner and the Government argue that a waiver of constitutional rights can be rendered ineffective only by official overreaching or government coercion, and not by internal psychological pressures. However, these

contentions fail to take into account the unique and unusual circumstances of this case. The substantial and undisputed medical evidence of Mr. Connelly's severe psychotic condition which rendered him incompetent precluded him from having the capacity to voluntarily, knowingly and intelligently waive his constitutional rights.

ARGUMENT

I. THE COLORADO COURTS CORRECTLY RULED THAT MR. CONNELLY'S INCULPATORY STATEMENT TO OFFICER ANDERSON RESULTED FROM HIS PSYCHOTIC MENTAL CONDITION AND ITS USE AT TRIAL WOULD VIOLATE DUE PROCESS OF LAW NOTWITHSTANDING THE ABSENCE OF COERCIVE POLICE CONDUCT.

The Fourteenth Amendment Due Process voluntariness requirement for confessions traces back to the case of *Brown* v. *Mississippi*, 297 U.S. 278 (1936). There, where the evidence showed that the defendants' confessions were obtained by brutally whipping them, "[t]here was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary." *Id.*, 297 U.S. at 283. Accordingly, "the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Id.*, 297 U.S. at 286.

While the Court in *Brown* used the terms "free" and "voluntary" to describe the due process requirement for confessions, in subsequent cases the Court has ruled violative of due process the admission of confessions that were "coerced" or "compelled" or obtained under "compulsion," *see Malinski* v. *New York*, 324 U.S. 401, 406 (1945); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 153 (1944);

Chambers v. *Florida*, 309 U.S. 227, 239 (1940); "not issue[d] from free choice," *Watts* v. *Indiana*, 338 U.S. 49, 53 (1949); or obtained as the result of "coercive influences," *see Davis* v. *North Carolina*, 384 U.S. 737, 752 (1966). Confessions are also involuntary in a due process sense where the defendant's "will was overborne," *Spano* v. *New York*, 360 U.S. 315, 323 (1959); *Lynumn* v. *Illinois*, 372 U.S. 528, 534 (1963); where the confession is not "the product of a rational intellect and a free will," *Blackburn* v. *Alabama*, 361 U.S. 199, 208 (1960); or is not "freely self-determined," *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961). In *Culombe* v. *Connecticut*, 367 U.S. 568 (1961), the Court stated that the test for voluntariness is whether the confession is "the product of an essentially free and unconstrained choice by its maker." *Id.*, 367 U.S. at 602. *See also*, *Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978) ("Mincey's statements were not 'the product of his free and rational choice.'") (quoting *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521 (1968)).

Although the cases have employed a variety of terms to describe confessions, which "by way of convenient shorthand," have been termed "involuntary," *Blackburn*, 361 U.S. at 207, "[t]hose cases yield no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 224 (1973). The difficulty in defining "voluntariness," it has been noted, is that the concept of voluntariness "is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes." *Culombe*, 367 U.S. at 605. *See also Miller* v. *Fenton*, ___ U.S. ___, 106 S.Ct. 445, 453 (1985).

The Court has tended to look at a number of various factors in determining whether a particular confession is

voluntary or involuntary. In *Harris* v. *South Carolina*, 338 U.S. 68 (1949), the Court stated that "[t]he systematic persistence of interrogation, the length of periods of questioning, the failure to advise the petitioner of his rights, the absence of friends or disinterested persons, and the character of the defendant constitute a complex of circumstances" which determine whether a confession is involuntary. *Id.*, 338 U.S. at 71. Later, in *Culombe* the Court set forth additional factors to be considered in making the voluntariness determination:

> Each of these factors [extensive cross-questioning, undue delay in arraignment, failure to caution a prisoner, refusal to permit communication with friends and legal counsel], in company with all of the surrounding circumstances—the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant.

Id., 367 U.S. at 601-02.

Thus, in determining the voluntariness of a confession "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation" are considered. *Bustamonte*, 412 U.S. at 226 (1973).

Applying the foregoing factors, confessions obtained by brutal torture,[4] deprivation of food or sleep,[5] decep-

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[4] *Brown* v. *Mississippi*, 297 U.S. 278 (1936) (confession by defendant after being brutally whipped).

[5] *Brooks* v. *Florida*, 389 U.S. 413 (1967) (defendant confined for 15 days in a punishment cell and given 12 ounces of food and 8 ounces of water per day).

tion[6] and threats[7] have been held involuntary. Similarly, confessions obtained during extended periods of confinement with prolonged or intense interrogation have also been held involuntary.[8] In these cases, while a common feature of the involuntariness determination was the nature and extent of the confinement and interrogation of the defendant, the Court made frequent references to the physical or mental infirmities or deficiencies of the defendants which reduced their abilities to resist the coercive effects of that confinement and interrogation. In *Chambers* the defendants were "ignorant young colored tenant farmers." *Id.*, 309 U.S. at 238; in *Spano* the defendant was a "foreign-born young man of 25 with no past history of law violation" who had "progressed only

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[6] *Spano* v. *New York*, 360 U.S. 315 (1959) (police officer-friend of defendant falsely told defendant that the officer would lose his job if defendant did not confess); *Leyra* v. *Denno*, 347 U.S. 556 (1954) (confession obtained by psychiatrist skilled in hypnosis whom police represented as physician who would treat defendant's sinus condition).

[7] *Haynes* v. *Washington*, 373 U.S. 503 (1963) (defendant told that he would not be allowed to communicate with his wife until he confessed); *Lynumn* v. *Illinois*, 372 U.S. 528 (1963) (police threatened to take defendant's children away if she did not confess); *Rogers* v. *Richmond*, 365 U.S. 534 (1961) (interrogating officer threatened to take defendant's wife into custody).

[8] *Davis* v. *North Carolina*, 384 U.S. 737 (1966) (defendant confined for 5 days and interrogated intermittently for 12 and a half hours); *Watts* v. *Indiana*, 338 U.S. 49 (1949) (defendant confined for 6 days and subjected to 9 to 10 hours of interrogation on 5 of the 6 days); *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944) (defendant confined incommunicado in a small room without sleep or rest for 36 hours and subjected to continuous interrogation); *Chambers* v. *Florida*, 309 U.S. 227 (1940) (defendant held incommunicado for 7 days and subjected to persistent and repeated interrogation, with overhanging threat of mob violence).

one-half year into high school" and "had a history of emotional instability." *Id.*, 360 U.S. at 321-22; and in *Davis* the defendant was "an impoverished Negro with a third or fourth grade education" whose "level of intelligence is such that it prompted the comment by the court below . . . that there is a moral question whether a person of Davis' mentality should be executed." *Id.*, 384 U.S. at 742. Thus, even in cases in which there was evidence of substantial police coercion, the mental characteristics of the defendant were considered a significant factor in the voluntariness determination.

As police interrogation practices became more humane and the physical abuse of defendants diminished or was not present, the Court noted that "police conduct requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will." *Jackson* v. *Denno*, 378 U.S. 368, 389 (1964). However, the Court has recognized that confessions obtained under less severe police conduct than had been present in earlier cases may be involuntary nonetheless: "[A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease." *Spano*, 360 U.S. at 321.

With the emphasis shifted away from physically coercive methods of obtaining confessions toward more sophisticated and subtle practices, the Court began to examine closely the psychologically coercive aspects of the interrogation process as well as the mental capacity of the defendant to resist that coercion. In *Fikes* v. *Alabama*, 352 U.S. 191 (1957), where the defendant was incarcerated for four days and interrogated for several hours a day on three of those days before he made a first

confession, and a second confession was made five days later after another five hours' interrogation, the Court noted at the outset of its opinion:

> It is, of course, highly material to the question before this Court to ascertain petitioner's character and background. He is a Negro, 27 years old in 1953, who started school at age eight and left at 16 while still in the third grade. There was testimony by three psychiatrists at the trial, in connection with a pleaded defense of insanity, to the effect that petitioner is a schizophrenic and highly suggestible.

Id., 352 U.S. at 193.

Later in the opinion the Court noted that "[t]here is no evidence of physical brutality, and particular elements that were present in other cases in which this Court ruled that a confession was coerced do not appear here." *Id.*, 352 U.S. at 197. The Court then held that the totality of "the circumstances of pressure applied against the power of resistance of this petitioner, who cannot be deemed other than weak of will or mind, deprived him of due process of law." *Id.*, 352 U.S. at 198.

Three years later the Court decided *Blackburn* v. *Alabama*, 361 U.S. 199 (1960), which presented a factual situation quite similar to the one in this case. In *Blackburn*, the defendant was arrested shortly after a robbery. About three weeks later, after an eight to nine-hour interrogation session with an hour's break, he confessed to the robbery. The evidence showed that the defendant had a prior history of mental illness and after being charged with the robbery had been found insane and incompetent to stand trial. He was found restored to competency four years later and was tried and convicted with the confession being admitted into evidence at the trial. Although noting that the eight to nine-hour interroga-

tion, the absence of the defendant's friends and relatives and the composition of the confession by the sheriff were "other pertinent circumstances," the primary factor in the Court's holding that the confession "most probably was not the product of any meaningful act of volition," *id.*, 361 U.S. at 211, was the mental illness of the defendant:

> In the case at bar, the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.

Id., 361 U.S. at 207.

A year later, in *Reck* v. *Pate*, 367 U.S. 433 (1961), the defendant was interrogated over a three-day period, was without adequate food, and was considered at least borderline retardation. Thus his "powers of resistance to overbearing police tactics," *id.*, 367 U.S. at 442, were insufficent to allow his confession to be considered voluntary.

In *Townsend* v. *Sain*, 372 U.S. 293 (1963), defendant was injected with prescribed drugs during an interrogation session to alleviate severe heroin withdrawal symptoms. Unknown to the police, one of the drugs injected had properties of a "truth serum." Additionally, a prosecution expert testified that the defendant was of such a low intelligence that he was a near mental defective and just a little above a moron. About an hour after the injection was administered, the defendant confessed to a

robbery and murder. In holding the confession inadmissible as involuntary, the Court stated: "It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum.'" *Id.*, 372 U.S. at 307-08. The Court then noted that in *Blackburn* it had "held irrelevant the absence of evidence of improper purpose on the part of the questioning officers." *Id.*, 372 U.S. at 309.

The foregoing progression of cases illustrates that as police conduct in obtaining confessions has evolved from the use of physical force and brutality to more subtle forms of psychological persuasion, the Court has increasingly looked to the mental condition of the defendant and the effect upon his or her mental state of the particular police conduct involved. And where there has been no impermissible police conduct, as in *Blackburn* and *Townsend*, the deficient mental condition of the defendants in those cases was sufficient to render their confessions involuntary. A rational application, not extension, of prior decisions of this Court fully supports the Colorado courts' conclusions that the admission of Mr. Connelly's confession to Officer Anderson at trial would violate his right to due process of law. Such a holding would involve no "new constitutional rule" designed to protect citizens from their own "self-generated compulsion to reveal information to the authorities." Brief of the United States at 10. Rather, it would involve simply an acknowledgement of the principles previously established in *Blackburn* and *Townsend* that under particular circumstances a confession may be involuntary even though there is no impermissible police conduct.

Given the unusual and unique circumstances of Mr. Connelly's severely impaired mental condition, the

absence of government coercion does not require reversal of the Colorado courts' findings of involuntariness. Dr. Metzner's undisputed testimony established that at the time of the confession Mr. Connelly was suffering from chronic schizophrenia and was experiencing command hallucinations under which his only option to making a confession was self-destruction. Also undisputed was Dr. Metzner's opinion that Mr. Connelly's mental condition was so substantially impaired that his confession was not the product of a free and rational decision. Finally, Dr. Metzner's determination that Mr. Connelly was so mentally impaired that he was incompetent to proceed judicially renders any confession made while under that disability clearly involuntary, and use of such a confession at trial would affront a "most basic sense of justice." *See Blackburn*, 361 U.S. at 201-02, 207. *See also*, *Iverson* v. *North Dakota*, 480 F.2d 414, 428 (8th Cir. 1973) (although statement obtained outside custodial interrogation setting, case remanded for hearing on competency of the defendant; if defendant was not competent, statement was involuntary and may not be used for any purpose); *Eisen* v. *Picard*, 452 F.2d 860 (1st Cir. 1971) (although trial court found no threats, pressure or suggestions by police officers in obtaining statements, it erred in failing to consider whether defendant's insanity rendered them involuntary); *United States* v. *Silva*, 418 F.2d 328 (2d Cir. 1969) (trial court erred in finding confession voluntary without receiving evidence as to defendant's mental condition). Thus the ruling of the Colorado courts that under the totality of the circumstances Mr. Connelly's statement was involuntary was factually and legally correct, and Mr. Connelly's statement to Officer Anderson was inadmissible "in any way" against him at trial. *Mincey*, 437 U.S. at 402.

The primary contention of both Petitioner and the Government in their respective briefs is that there can be no violation of the Due Process Clause in the absence of coercive government conduct. Brief of Petitioner, at 14; Brief for the United States, at 12.[9] However, as noted earlier, the determination of voluntariness depends upon an assessment of "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation," *Bustamonte*, 412 U.S. at 226. There the Court surveyed a number of cases in which confessions had been found involuntary in a due process context and noted that "[t]he significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion." *Ibid.*

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[9] In its brief the Government notes that "[t]he most difficult question would arise when the suspect has a weakness or susceptibility not known to the police but in fact making him especially vulnerable to some otherwise permissible form of interrogation." Brief of the United States, at 16 n.4. The Government thus appears to recognize that a confession in a particular situation may be considered involuntary without official coercion. See *United States* v. *Murphy*, 763 F.2d 202 (6th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 812 (1986). (statements by defendant made out of fear of being bitten by police dogs used to arrest him held involuntary); *United States* v. *Brown*, 557 F.2d 541 (6th Cir. 1977) (statements by defendant induced by fear of beating by police, but which were not in response to questioning held involuntary); *Commonwealth* v. *Louraine*, 390 Mass. 28, 453 N.E.2d 437 (1983) (defendant's insanity may render spontaneous inculpatory statements he made at scene of crime upon arrival of police involuntary); *State* v. *Caouette*, 446 A.2d 1120 (Me. 1982) (fact that defendant was emotionally upset when he made spontaneous statement adequately supported trial court's finding that statement was involuntary); *Commonwealth* v. *Mozillo*, 443 Pa. 171, 278 A.2d 874 (1971) (spontaneous statements made to correctional facility guard while defendant incompetent to stand trial held inadmissible as unreliable).

Thus, the absence of government conduct in obtaining a confession in and of itself cannot preclude a finding of involuntariness where the overwhelming evidence of Mr. Connelly's impaired mental condition clearly indicated that his confession to Officer Anderson was not "the product of a rational intellect and a free will." *Blackburn*, 361 U.S. at 208. Accordingly, "*any* criminal trial use against . . . [Mr. Connelly] of his *involuntary* statement is a denial of due process of law." *Mincey*, 437 U.S. at 398. (emphasis in original) *See also Brooks*, 389 U.S. at 415 (1967); *Culombe*, 367 U.S. at 635; *Blackburn*, 361 U.S. at 205.

II. MR. CONNELLY'S PSYCHOTIC MENTAL CONDITION RENDERED HIS WAIVER OF *MIRANDA* RIGHTS INEFFECTIVE.

A. *Applicability Of Miranda* v. *Arizona*.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966) this Court established "concrete constitutional guidelines for law enforcement agencies and courts to follow" in "applying the privilege against self-incrimination to in-custody interrogation[s]." *Id.*, 384 U.S. at 441-42. Accordingly, the Court there held

> that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary.

Michigan v. *Mosley*, 423 U.S. 96, 99-100 (1975).

The applicability of these requirements does not, as suggested by the Government, depend on whether their

underlying rationale is fulfilled in each particular case. Rather, "the Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda*, 384 U.S. at 468.

Miranda applies only to statements obtained through "custodial interrogation," that is, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," *id.*, 384 U.S. at 444, and expressly exempts volunteered statements from its reach: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.*, 384 U.S. at 478. Thus Mr. Connelly's initial statement to Officer Anderson is not subject to the *Miranda* requirements.

While Petitioner does not question the applicability of *Miranda* to Mr. Connelly's subsequent statements to Officer Anderson,[10] the Colorado Attorney General does question whether they were obtained pursuant to custodial interrogation,[11] and the Solicitor General, while conceding that Mr. Connelly was in custody, asserts that

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[10] In the Brief of Petitioner the State does not allege that Mr. Connelly's statements were not the result of custodial interrogation. The State's concession of custody and interrogation should be determinative of the issue. *Oregon* v. *Elstad*, ____ U.S. ____, ____, 105 S.Ct. 1285, 1297 (1985).

[11] *See* Brief *Amici Curiae* in Support of the Petitioner by the Colorado Attorney General and the 35 *Amici* that Appear on the Inside Cover at 13, n.10.

the questioning was not "interrogation," but rather merely "follow-up questioning" to the initial volunteered statement.[12] Since the subsequent statements were made to Anderson by Mr. Connelly after he was handcuffed and removed from the street, he certainly was in custody. *See New York* v. *Quarles*, 467 U.S. 649, 655 (1984). And since Mr. Connelly's statements were made in response to questioning by Anderson, the interrogation requirement was also met. *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980) ("[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police know are reasonably likely to elicit an incriminating response from the suspect.")

B. Effectiveness Of Waiver.

In *Miranda*, the Court acknowledged that a defendant could waive the required rights and make a statement that would be admissible in court. However, the Court cautioned:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are

[12] Brief for the United States at 22-23 n.7, 25.

> given or simply from the fact that a confession was in fact eventually obtained.

Id., 384 U.S. at 475.

Although an express waiver is not required, "[t]he courts must presume that a defendant did not waive his rights." *North Carolina* v. *Butler*, 441 U.S. 369, 373 (1979). In the present case, although Mr. Connelly stated that he understood his rights and answered the officers' questions, under *Miranda* and *Butler* this is not enough to constitute a valid waiver. *See also*, *Tague* v. *Louisiana*, 444 U.S. 469, 471 (1980). Assuming, however, that a waiver occurred, Mr. Connelly's impaired mental condition rendered it ineffective.

In *Miranda* the Court adopted the test formulated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)—"an intentional relinquishment or abandonment of a known right or privilege"—for determining the validity of a waiver of the constitutional rights to counsel and to silence. Since the Court in *Johnson* had also stated that there must be "an intelligent and competent waiver by the accused," *id.*, 304 U.S. at 465, the Court in *Miranda* indicated that the waiver must be voluntary as well. *Miranda*, 384 U.S. at 444, 476. *See also*, Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193, 200 (1977). Subsequent cases have adopted this view and emphasized that voluntariness is a component of a waiver of *Miranda* rights. "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *Butler*, 441 U.S. at 373. The determination of the validity of a waiver of Miranda rights is to be made upon "an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo

his rights to remain silent and to have the assistance of counsel." *Fare* v. *Michael C.*, 442 U.S. 707, 725 (1979). *See also, Edwards* v. *Arizona*, 451 U.S. 477, 482 (1981) (quoting *Johnson* v. *Zerbst*, 304 U.S. at 464):

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

In *Edwards* the Court also indicated that "the voluntariness of a consent or admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries." *Id.*, 451 U.S. at 484.

In the recent case of *Moran* v. *Burbine*, ___ U.S. ___, 106 S.Ct. 1135 (1986), the Court, citing *Edwards*, reiterated the standards for determining waiver under *Miranda*:

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id., ___ U.S. at ___, 106 S. Ct. at 1141.

The Court's description of the voluntary component of the waiver requirement in *Burbine* substantially resembles that of the traditional due process voluntariness requirement of confessions which requires the "exercise

of 'a rational intellect and a free will.'" *Mincey* v. *Arizona*, 437 U.S. at 398. *See also, Elstad*, ___ U.S. at ___, 105 S. Ct. at 1285, 1293 (1985). Given the large body of decisional law presently existing in the due process area, any determination of whether a waiver is voluntary should be made with reference to those circumstances in which a confession is considered to be voluntary in a due process sense. Since, as established in Argument I, *supra*, Mr. Connelly's psychotic mental condition rendered his confession involuntary in a due process context, his subsequent statements should likewise be considered involuntary for purposes of the voluntary component of the *Miranda* waiver requirement.

As in the due process voluntariness of confessions context, the State and the Government contend that a waiver of constitutional rights can be invalidated only by official overreaching or government coercion, and not by internal psychological pressures. Allowing a consideration of such pressures, the Government asserts, "would force courts to confront complex and uncertain issues of 'free will' in order to evaluate the propriety of a *Miranda* waiver, and make it difficult for police officers to predict in advance whether a suspect's waiver would be upheld." (Brief for the United States at 29)

However, as indicated in Argument I, *supra*, this Court traditionally has considered the mental condition and characteristics of the defendant in determining whether a confession is voluntary. Moreover, a totality of circumstances standard, by definition, would include the mental features of a particular defendant, and any lack of predictability in determining the validity of a waiver is attributable more to the nature of the standard than to the factors which are included or excluded in applying it.

The effect of Mr. Connelly's impaired mental condition is not limited to the voluntary component of the waiver requirement. It is applicable as well to the requirements of a knowing and intelligent waiver. As noted above Dr. Metzner, in his initial report submitted to the trial court, concluded that Mr. Connelly was incompetent to proceed to trial and that his psychosis which resulted in this incompetence existed at the time of the confession and statements. In light of this uncontested evidence that Mr. Connelly was incompetent at the time of the statements made to police officers in response to questioning, he clearly could not have knowingly and intelligently, as well as voluntarily, waived his rights to counsel and to remain silent.

In discussing the value of waivers in criminal cases the Court has noted that "[u]nless an individual is incompetent, we have in the past rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case." *Mosley*, 423 U.S. at 108-09 (1975) (White, J., concurring). In so stating, the Court has necessarily recognized that a person who is not mentally competent may not be able to voluntarily, knowingly and intelligently waive his rights. *See also*, *Pate* v. *Robinson*, 383 U.S. 375, 384 (1966) ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."); *Westbrook* v. *Arizona*, 384 U.S. 150 (1966) (finding of competence to stand trial not determinative of competence to waive right to representation of counsel); *Moore* v. *Ballone*, 658 F.2d 218 (4th Cir. 1981) (defendant's impaired mental condition invalidated *Miranda* waiver).

The undisputed evidence of Mr. Connelly's impaired mental condition should preclude a determination that he

voluntarily, knowingly and intelligently waived his constitutional rights. Such a determination necessarily presupposes a "capacity acceptably to evaluate and to choose among different courses of action." Dix, *supra*, at 260. The testimony of Dr. Metzner refutes the notion that Mr. Connelly possessed any capacity to choose between exercising or waiving his rights to counsel or to remain silent. While Dr. Metzner indicated that in his opinion Mr. Connelly had the capacity to know that he was being read his *Miranda* rights, he was of the further opinion that Mr. Connelly "wasn't able to use that information because of the command hallucinations that he had experienced." (J.A., 26) From Mr. Connelly's perspective the choice between waiving or exercising his rights was indistinguishable from a choice between life or death, which, of course, is no choice at all. Lacking the capacity to make a conscious choice between these options, Mr. Connelly could not be said to have waived his rights to counsel and to remain silent. Thus, the trial court's ruling, supported as it was by Dr. Metzner's substantial and uncontradicted testimony as to Mr. Connelly's severely impaired mental condition at the time he made the confession and statements, was correct and the Colorado Supreme Court's affirmance of it was, correct as well.

CONCLUSION

For the foregoing reasons, Respondent submits that the judgment of the Colorado Supreme Court should be affirmed.

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